87 1858

CASE NUMBER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM-1987

JOHN S. WISNIEWSKI, Petitioner

-vs-

STATE OF NEW JERSEY, Respondent

ON WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI FOR DEFENDANT

MICHAEL J. MELLA, ESQ.
12-45 River Road
P.O.Box 1095
Fair Lawn, New Jersey 07410-8095
201-794-0022
Attorney for Petitioner

QUESTIONS PRESENTED

I. Was the petitioner's constitutional rights, specifically the Fifth Amendment of the Constitution, violated by allowing the State to appeal the sentence given to the petitioner by the sentencing judge?

II. Did the State waive any and all rights it had to appeal the sentence as a result of a waiver given during the sentencing procedure by the State Prosecutor?

III. Is N.J.S. 2C:44-1f(2) allowing the State to appeal a sentence properly imposed by a state judge is in violation of the United States Constitution?

IV. Is N.J.S. 2C:44-1d constitutional in that it requires a presumption of imprisonment for conviction of a crime in the second degree?

V. Is the language set forth in N.J.S. 2C:44-1d requiring the sentencing court to find that imprisonment would be a serious injustice to override the presumption of imprisonment unconstitutional and vague?

VI. Is the provision of N.J.S. 2C:44-1f(2) allowing a 10-day stay of sentence in order for the State to decide whether or not to appeal constitutional?

VII. Is N.J. Rule 2:9-3(d) which creates an automatic stay of sentence pending an appeal by the State yet requires that bail be set during the Appellate stage constitutional?

VIII. Is the imposition of bail pursuant to N.J. Rules 2:9-3 and 2:9-4 in violation of the Double Jeopardy Clause of the United States Constitution in

that the imposition of bail after sentencing constitutes inception of the sentence itself?

PARTIES TO THE LOWER COURT PROCEEDING

A. John S. Wisniewski, defendant

B. State of New Jersey, plaintiff

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

OPINIONS OF COURT BELOW

Bergen County Indictment No. S-123-86 charged defendant-respondent JOHN S. WISNIEWSKI in Count I with aggravated sexual assault (a first degree crime) in that he performed cunnilingus upon R.B., a seven year old girl, in violation of N.J.S.A. 2C:14-2(a)(1), in Count II with sexual assault (a second degree crime) by forcing the victim to touch the defendant's penis, in violation of N.J.S.A. 2C:14-2b; and in Count III with a second charge of sexual assault by touching the victim's genitals, contrary to N.J.S.A. 2C:14-2(b).

On September 22, 1986, in the Superior Court of New Jersey, Law Division, Bergen County, before the Honorable Alfred D. Schiaffo, J.S.C.,

defendant entered a plea of guilty to Count III, sexual assault. Pursuant to plea negotiations, the State agreed to move to dismiss the remaining counts at the time of sentencing. No agreement was made with regard to the sentence, but defendant acknowledged on the record that he knew his prison exposure would be five to ten years and that a parole ineligibility period of up to one-half that term could be imposed. On February 27, 1987, Judge Schiaffo sentenced defendant to five years of probation, with permission to transfer the probation to Florida, and a $25.00 penalty payable to the Violent Crimes Compensation Board. The probation was conditioned on his seeking psychiatric counselling of defendant's choice. The court stayed the sentence for ten days

to permit the State time to file an appeal.

On March 4, 1987, within the ten day period, the State filed a Notice of Appeal with the Appellate Division. Thereafter, Judge Schiaffo extended the stay pending the resolution of the appeal.

On December 2, 1987, the Appellate Division of the Superior Court of New Jersey, in a Per Curiam decision reversed the sentence of probation and remanded the matter to the Law Division for further proceedings in accordance with the Appellate Division decision. The Appellate Division did not retain jurisdiction.

On December 21, 1987, a Notice of Petition for Certification was filed with the Clerk of the Supreme Court.

On March 10, 1988, the Petition for Certification to the Supreme Court of the State of New Jersey was denied.

STATEMENT OF THE JURISDICTION OF THE COURT

The Supreme Court has jurisdiction to review the judgment of the Supreme Court of the State of New Jersey which is a court of last resort in this particular matter which is a criminal case and when a Federal or Constitutional question is involved. The Supreme Court of the State of New Jersey on March 10, 1988, ordered that the Petition for Certification before that Court be denied. That order in effect affirmed the decision of the Superior Court of New Jersey, Appellate Division, dated December 2, 1987, which reversed and remanded for further pro-

ceedings the probation sentence imposed by the sentencing judge, the Honorable Alfred D. Schiaffo, J.S.C. Judge Schiaffo, on February 27, 1987, had sentenced the petitioner to five years probation.

STATUTES INVOLVED

A. N.J.S. 2C:44-1(d) (See Appendix)

B. N.J.S. 2C:44-1(f) "

C. N.J. Rules 2:9-3 "

D. N.J. Rules 2:9-4 "

E. Fifth Amendment of the United States Constitution

F. 14th Amendment of the United States Constitution.

STATEMENT OF THE CASE

One afternoon during the month of September 1985, a seven-year old second grade girl named R.B., was

playing outside her home when she saw John Wisniewski (age 62) and walked over to him. The little girl knew Mr. Wisniewski because he was her next door neighbor and because he worked at her school. When R.B. approached, Wisniewski greeted her and then told her he was going to eat her up, a comment that the child did not understand. The defendant directed her inside his home and told her to lie down on his couch. R.B. complied. Wisniewski then removed her pants and panties and performed cunnilingus on her by licking -- and slightly penetrating--her vagina. He then rubbed her vagina with his fingers.

When defendant finished these acts he told the little girl it was her turn and then he pulled down his

zipper, displayed his penis, and masturbated in front of her. He proceeded to go into the bathroom where he ejaculated into the toilet in view of the child. He then told R.B. not to tell anyone what had occurred.

The little girl's mother did not learn of these events until two months later, after R.B. told several of her classmates, one of whom told her own mother, who in turn told R.B.'s mother. The victim's mother called the Garfield Police, who contacted the Bergen County Prosecutor's Office. After Senior Investigator Nass of the Prosecutor's Office took a statement from the little girl, the Garfield Police arrested Wisniewski. Wisniewski subsequently gave a statement to Senior Investigator Nass in which he confessed performing

the sexual acts upon the child. He told the investigator, however, that after he made his comment to R.B. about eating her up she had said, "Go ahead. Not out here. Let's go in the house." He also stated that she had been the one "on her own accord" to lie down on the couch.

On September 22, 1986, in the Superior Court of New Jersey, Law Division, Bergen County, before the Honorable Alfred D. Schiaffo, J.S.C., defendant entered a plea of guilty to Count III, sexual assault. Pursuant to plea negotiations, the State agreed to move to dismiss the remaining counts at the time of sentencing. No agreement was made with regard to the sentence, but defendant acknowledged on the record that he knew his prison exposure

would be five to ten years and that a parole ineligibility period of up to one-half that term could be imposed. On February 27, 1987, Judge Schiaffo sentenced defendant to five years of probation, with permission to transfer the probation to Florida, and a $25.00 penalty payable to the Violent Crimes Compensation Board. The probation was conditioned on his seeking psychiatric counselling of defendant's choice. The court stayed the sentence for ten days to permit the State time to file an appeal.

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On December 21, 1987, a Notice of Petition for Certification was filed with the Clerk of the Supreme Court.

During the entire proceedings the petitioner has remained on bail in the amount of $5,000.00. He must abide by the rules and regulations of the Probation Department.

The Federal question of Double Jeopardy was raised by the petitioner in the petition filed for certification

before the New Jersey Supreme Court, more specifically in Point III of said petition, on page 10, which states as follows:

"... At this point it should be clear that the State did, in fact, waive its right to incarceration, and, in effect, waived its right to appeal the sentence, and since the waiver was effective it would appear that the petitioner is being placed in double jeopardy by allowing the State to continue to prosecute an appeal of the sentence in this matter. If in fact this is a Double Jeopardy situation, to allow the continuing appeal of the sentence will be a violation of the New Jersey Constitution, Article I, Paragraph 11, and the Federal Constitution Amendment Five."

ARGUMENT

The Writ of Certiorari should be granted in this case for the special and important reasons set forth below.

POINT I

TO ALLOW THE STATE TO APPEAL A SENTENCE PROPERLY IMPOSED BY THE TRIAL JUDGE CONSTITUTES DOUBLE JEOPARDY

N.J.S. 2C:44-1f(2) authorizing the State to appeal from a sentence which is non custodial or probationery in nature imposed by a duly constituted Superior Court State Judge on the grounds that the sentence is too lenient violates the whole prohibition against multiple trials as embodied in the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution. It was so aptly put by Justice Brennan in his dissenting opinion in the five to

four decision of the Supreme Court in The United States vs. DiFrancesco, 101 S.Ct. 426 (1980) when Justice Brennan stated:

> "Because the Court fundamentally misperceives the appropriate degree of finality to be accorded the imposition of sentence by the trial judge, he reaches the erroneous conclusion that enhancement of a sentence pursuant to §3576 is not an unconstitutionl multiple punishment. I respectfully dissent."

In the DiFrancesco case supra, Justice Brennan outlines the reasons why the government should be prohibited from appealing a sentence that has been properly given and within the law by a properly constituted judge.

"The court acknowledges as it must that the Double Jeopardy Clause has two principal purposes: to protect an individual from being subjected to

the hazards of trial and possible conviction more than once for an alleged offense, Green vs. The United States, 78 S.Ct.221 (1957), and to prevent imposition of multiple punishments for the same offense. North Carolina vs. Pierce, 89 S.Ct. 2072 (1969). An overriding function of the double jeopardy clause is prohibition against multiple trials. It is to protect against multiple punishments. It is the punishment that would legally follow the second conviction which is the real danger guarded by the Constitution. Ex parte Lange, 21 L.Ed. 872 (1874)." See United States vs. DiFrancesco, supra. In DiFrancesco supra, Justice Brennan eloquently states the appropriate rule of law which should have been followed by the

majority in that case where he states on page 442:

"The sentencing of a convicted criminal is sufficiently analogous to a determination of guilt or innocence that the double jeopardy clause should preclude government appeals from sentencing decisions very much as it prevents appeals from judgments of acquittal. The sentencing proceeding involves the examination and evaluation of facts about the defendant which may entail the taking of evidence and a pronouncement of the sentence. Thus imposition of a 10-year sentence where a 25-year sentence is permissible under the sentencing statute constitutes a finding that the facts justify only a 10-year sentence and that a higher sentence is unwarranted. In both acquit-

tals and sentences, the triar of fact makes a factual adjudication that removes from the defendant's burden of risk the charges of which he was acquitted and the potential sentence which he did not receive. Unless there is a basis for according greater finality to acquittals whether explicit or implicit than to sentences, the Court's results is untenetable."

By allowing the State to appeal on this Wisniewski case, we are completely removing the judge from the judicial system. What we are doing is making the judge a recommender of sentenses as opposed to the normal judicial responsibility of setting sentences. We are relegating the post of judge to a mere probation officer who prepares a probation report and

then recommends possible sentence to the court. The particular Statute in New Jersey, which automatically stays any probation sentence or non custodial sentence for a period of 10 days, allows the prosecution to become the judge. This is a clear second attempt at prosecution against the defendant, a clear violation of the United States Constitution Fifth Amendment prohibiting Double Jeopardy. "... nor shall any person be subject for the same offense or be twice put in jeopardy of life or limb ..." U.S.C.A. Constitution, Amendment Five.

In the Wisniewski case, the petitioner has already been made the subject to the offense to which he pleaded guilty when he was sentenced by the trial court. Judge Schiaffo

gave what was a legal sentence pursuant to New Jersey law thereby completing the procedures related to the charge that Wisniewski pleaded guilty to. At that point the case should be over. To allow a further proceeding allows the government a second opportunity to present evidence to an Appellate Court that it could have presented in the first instance, a clear violation of the Fifth Amendment. In a footnote to the United States vs. DiFrancesco, in his dissenting opinion, Judge Brennan states:

"Another purpose of the Double Jeopardy Clause is to prevent 'enhancing the possibility that even though innocent, [a defendant] may be found guilty'." Green vs. United States, 78 S.Ct. at 223. A similar

analysis applies with respect to sentencing. Repeat attempts at sentencing are as likely to produce an unjustifiably harsh sentence as repeated trials are likely to result in an unwarranted guilty verdict. In both instances, the government seeks a second opportunity to present evidence it could have presented in the first instance. Birk vs. United States, supra. at 11, 98 S.Ct. at 2147 (The Court of Appeals .... may .... remand for further sentencing proceedings and imposition of sentence.'"

Justice Brennan further states, at page 444 in United States vs. DiFrancesco, supra., "I believe that the court fundamentally misunderstands the import to the defendant of the sentencing proceedings."

"I suggest that most defendants are more concerned with how much time they must spend in prison than with whether their record shows a conviction. This is not to say that the ordeal of trial is not important. And obviously it is the conviction itself which is the predicate for time in prison. But clearly, the defendant does not breathe a sigh of relief once he has been found guilty. Indeed, an overwhelming number of criminal defendants are willing to enter plea bargains in order to keep their time in prison as brief as possible. Surely the court cannot believe that the sentencing phase is merely incidental and that the defendants do not suffer acute anxiety. To the convicted defendant, the sentencing phase is certainly as

critical as the guilt/innocence phase. To pretend otherwise as a reason for holding 18 U.S.C. §3576 valid is to ignore reality." See United States vs. DiFrancesco, supra. at page 444. In that quote, Justice Brennan clearly indicates that the sentencing phase of a trial is as critical and as important as the trial itself, and it should be clear that the sentencing phase of the trial is just the final step to the completion of the overall trial procedure and to allow the state or government to go beyond the sentencing procedure is to allow the government to place a defendant in a Double Jeopardy situation. To allow an appeal of an otherwise legal sentence in a sense reopens the case and allows the government to place the defendant in a

situation where his trial has been reopened for the purpose of resentencing. This is clearly a Double Jeopardy situation.

If we allow the government to reopen a case for the purpose of resentencing an otherwise legal sentence, why not go further and allow the government to reopen acquittals under certain cases? Why would the reopening of acquittals sound so foolish that the reopening of sentencing does not? Why is not the reopening of acquittals and the reopening for the purpose of resentencing one and the same? Why is one considered Double Jeopardy and one not? In The United States vs. DiFrancesco, supra. Justice Brennan wrote:

"Because the court has demonstraed no basis for differentiating between the finality of acquittals and the finality of sentences, I submit that a punishment enhanced by an Appellate Court is unconstitutional multiple punishment. To conclude otherwise, as the court does, is to create an exception to basic Double Jeopardy protection which, if carried to its logical conclusion, might not prevent Congress, on Double Jeopardy grounds, for authorizing the government to appeal verdicts of acquittal. Such a result is plainly impermississible under the Double Jeopardy Clause.

"I, therefore, dissent."

POINT II

PETITIONER'S CONTINUING BAIL CIRCUMSTANCES IS AKIN TO STARTING THE SENTENCE, AND TO ALLOW AN APPEAL IS A VIOLATION OF DUE PROCESS AND DOUBLE JEOPARDY

In United States vs. DiFrancesco, supra. at page 445, Justice Stevens in dissenting and joining Justice Brennan's dissent noted that the court in the DiFrencesco case did not adequately respond to Justice Harlan when he analysed the Double Jeopardy issue. In North Carolina v. Pierce, 89 S. Ct. 2072 (1969), Justice Stevens in quoting Justice Harlan stated:

"Every consideration enunciated by the Court in support of the decision in Green v. United States, 355 U.S. 184 [78 S.Ct.221, 2 L.Ed.2d 199] (1957) applies with equal force to the situation at bar. In each instance,

the defendant was once subjected to the risk of receiving a maximum punishment, but it was determined by legal process that he should receive only a specified punishment less than the maximum. See id., at 190 [78 S.Ct. at 225]. And the concept of fiction of an 'implicit acquittal' of the greater offense, ibid, applies equally to the greater sentence: in each case it was determined at the former trial that the defendant or his offense was of a certain limited degree of 'badness' or gravity only, and therefore merited only a certain limited punshment.

"If, as a matter of policy and practicality, the imposition of an increased sentence on retrial has the same consequences whether effected in the guise of an increase in the degree

of offense or an augmentation of punishment, what other factors render one route forbidden and the other permissible under the Double Jeopardy Clause? It cannot be that the provision does not comprehend 'sentences' - as distinguished from 'offenses' - for it has long been established that once a prisoner commences service of sentence, the Clause prevents a court from vacating the sentence and then imposing a greater one. See United States v. Benz, 282 U.S. 304, 306-307 [51 S.Ct. 113, 114, 75 L.Ed. 354] (1931); Ex parte Lange, 18 Wall. 163, 168, 173 [21 L.Ed. 872] (1974)." Id. at 746-747, 89 S.Ct. at 2086.

"The Court's response to this analysis is nothing more than a rather wooden extrapolation from a rationale

that, however it may be 'variously verbalized,' id., at 720-721, 89 S.Ct., at 2078, is wholly irrelevant to the important question presented by this case.

"Because I agree with what Justice BRENNAN has written today as well as with what Justice Harlan wrote in 1969, I respectfully dissent."

The petitioner in this case has been continued on bail since the sentence has been imposed. Although the actual probation sentence itself was stayed as a result of the New Jersey Rules, the continuation of the petitioner on bail pursuant to New Jersey Rules 2:9-3 and 2:9-4 prevents the petitioner from being in a state of freedom. Petitioner must abide by the rules and regulations of the Probation

Department as they relate to persons who are out on bail. Therefore, for all intents and purposes petitioner has been sentenced. Suppose the petitioner were one who was unable to make bail and instead sat in a county jail or a prison during the entire pendency of the State's appeal, would he then be considered having started his sentence when in fact his sentence would be probation? And, if he was able to make bail he would be out on the street as opposed to being housed in a prison or county jail. In State v. Farr, 183 N.J.S. 463 (1982) at page 471, the court held:

"We hold that jeopardy is attached when defendant commenced serving his sentences. Consequently we cannot interfere with those sentences

without violating defendant's constitutional right to be free from Double Jeopardy as guaranteed by the United States and the New Jersey Constitutions." State v. Ryan, 86 N.J.1, 1981. Certiorari denied, 102 S.Ct. 363, 1981. Petitioner submits that there is absolutely no difference between the Double Jeopardy violations once a sentence actually begins or once a sentence has been promulgated by a Court of proper jurisdiction, especially so when the sentence of the Court was a legal one.

Petitioner feels that his rights of due process have been violated: "These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a

capital case than they are due in the guilt determining phase of any criminal trial." See Presnell v. Georgia, 99 S.Ct. 235, 1978.

POINT III

N.J.S. 2C:44-1d IS UNCONSTITUTIONAL AND VAGUE

N.J.S. 2C:44-1d states that the judge shall impose a sentence of imprisonment unless "having regard to the character and condition of the defendant it is of the opinion that his imprisonment would be a serious injustice which overrides the need to deter such conduct by others." That Statute as set forth above sets no guidelines for the sentencing judge to consider other than the words "character and condition of the

defendant," and the words "serious injustice." What exactly does the Statute mean when it says character and condition of the defendant and serious injustice? The legislature in setting forth this section of the law did not set forth any guidelines by which the judges must be bound when making a consideration of sentence. The Statute is vague and is subject to many different interpretations. Does it mean that the judges have wide discretion and may issue a probation sentence or a non custodial sentence because the particular defendant is ill? Does it mean that a defendant who may be a first time offender should be released on probation because otherwise he has good character? What does it mean when it says "serious injustice?" Serious

injustice as to who? To the victim? To society? Or, to the defendant himself? The Statute is vague in its meaning. It lacks definition and guidelines and should be struck as unconstitutional.

POINT IV

UNITED STATES vs. DiFRANCESCO, SUPRA., SHOULD BE REVERSED

As has been previously stated in this petition in Point I, Justice Brennan in his dissent, United States vs. DiFrancesco, supra., stated that:

"Because the court has demonstrated no basis for differentiating between the finality of acquittals and the finality of sentences, I submit that a punishment enhanced by an Appellate Court is an unconstitutional multiple punishment. To conclude otherwise, as

the court does, is to create an exception to basic Double Jeopardy protection which, if carried to its logical conclusion, might not prevent Congress, on Double Jeopardy grounds, from authorizing the government to appeal verdicts of acquittal. Such a result is plainly impermissible under the Double Jeopardy Clause."

In that one short paragraph Justice Brennan succinctly sets forth the fact that allowing the government or the State of New Jersey as in this case to appeal an otherwise legal sentence is a violation of the constitutional rights of the individual defendant. The case of United States vs. DiFrancesco, supra., should be reversed based on the reasons set forth by Justice Brennan in his dissent as

well as the reasons set forth by Justice Stevens in his dissent.

It is not unusual for the Supreme Court of the United States to overrule a prior precedent set by that Court. There are many examples where the Court overruled itself when it became obvious that the prior Court rulings were either no longer logical or were plainly wrong. One example of United States Supreme Court overruling itself can be found in West Virginia State Board of Education vs. Barnette, 63 S. Ct. 1178 (1943).

CONCLUSION

For the reasons set forth above, petitioner, John S. Wisniewski, requests that the petition for Writ of Certiorari be granted.

Respectfully submitted,

MICHAEL J. MELLA, ESQ.
Attorney for Petitioner

Dated: April 7, 1988

SUPREME COURT OF NEW JERSEY
C-696 September Term 1987
28,167

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

JOHN S. WISNIEWSKI,
Defendant-Petitioner.

ON PETITION FOR
CERTIFICATION

F I L E D
SUPREME COURT
March 10, 1988

Stephen W. Townsend
Clerk

To the Appellate Division,
Superior Court,

A petition for certification of the judgment of A-2941-86T5 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for

certification is denied, with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 8th day of March, 1988.

/s/ Stephen W. Townsend
CLERK OF SUPREME COURT

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/Stephen W. Townsend

CLERK OF THE SUPREME COURT
OF NEW JERSEY

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2941-86T5

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

JOHN S. WISNIEWSKI,
Defendant-Petitioner.

ORIGINAL FILED
APPELLATE DIVISION
DEC. 2, 1987

Jack G. Trubenbach
Clerk

Submitted October 20, 1987
Decided Dec. 2, 1987
Before Judges Shebell and A.M. Stein.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County.

Larry J. McClure, Bergen County Prosecutor, attorney for appellant (Susan W. Sciacca, Assistant Prosecutor, of counsel, on the letter brief).

Michael J. Mella, attorney for respondent (Mr. Mella on the brief).

PER CURIAM.

Pursuant to N.J.S.A. 2C:44-1f(2), the State appeals a five-year probationary sentence imposed upon defendant after he pleaded guilty to sexual assault upon a seven-year-old girl, a crime of the second degree. N.J.S.A. 2C:14-2b. Defendant was sixty-three years old at the time of this offense. We reverse.

A three count indictment was originally returned against defendant. He was charged with performing cunnilingus upon the young victim, an aggravated sexual assault in violation of N.J.S.A. 2C:14-2a(1) (count I); of forcing her to touch his penis, a sexual assault (count II); and of touching the victim's genitals, also a sexual assault (count III).

Pursuant to a plea bargain, defendant entered a plea of guilty to count III, sexual assault. When questioned about the offense by the judge, defendant stated:

> I took her in the house and pulled down her pants and rubbed my hands on her vagina.

No agreement was made about the sentence that defendant would receive. He did acknowledge on the record that he knew that his prison term exposure was five to ten years and that he could be ineligible for parole for up to one-half the time of sentence.

The sentencing judge imposed a five-year term of probation, which he transferred to Florida, the defendant's present place of residence. Psychiatric counselling, by a professional of defendant's choice, was also imposed as

a condition of probation. The judge reasoned that whatever sentence he imposed, nothing could make up for the terrible trauma incurred by the young victim. He regarded defendant's behavior as "twenty minutes of abhorrent behavior" in an otherwise model citizen, a former mayor of his community. He further took into account defendant's age, his health as a diabetic, and his belief that the offenses would not recur.

Conviction for a crime of the second degree carries with it a presumption of imripisonment. That presumption can only be overcome if the sentencing judge

> ...is of the opinion that his [the defendant's] imprisonment would be a serious injustice which overrides the need to deter such conduct by others. N.J.S.A. 2C:44-1d.

The presumption of incarceration was not overcome in this case. Imprisonment is mandated for a crime of the second degree except in truly extraordinary circumstances, where the need to deter is outweighed by the serious injustices to the individual if he is imprisoned. Absent a proper determination of "serious injustice," considering defendant's character and condition, the court must impose a custodial sentence. State v. Roth, 95 N.J. 334, 358-359 (1984). Under our criminal code, which focuses on the severity of the offense rather than upon factors personal to a defendant, State v. Hodge, 95 N.J. 369, 377 (1984), a probationary term for this offense was an abuse of discretion. Considering the gravity of this crime, neither this

defendant's health nor the interference with his retirement to Florida constitute sufficient cause to conclude that imposition of a prison term constitutes a serious injustice.

By this opinion, we do not mean to suggest that the sentencing judge is not authorized to make a qualitative analysis to determine whether he is clearly convinced that the mitigating factors substantially outweigh the aggravating factors listed in N.J.S.A. 2C:44-1(a) and (b). If such a conclusion is made, the court is authorized to sentence defendant to a prison term for a crime one degree lower than that of the conviction. N.J.S.A.2C:44-1(f)(2). State vs. Roth, supra, 95 N.J. at 359.

We are satisfied that the State did

not waive its right to seek incarceration at the time of sentencing. The Assistant Prosecutor clearly asserted the State's position that a period of incarceration was warranted for this defendant. He only suggested probation in the event that the court felt that defendant was physically incapable of serving a period of incarceration.

The sentence of probation is reversed and the matter is remanded to the Law Division for further proceedings in accordance with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office

Jack G. Trubenbach
Clerk of the Appellate Division

BERGEN COUNTY PROBATION DEPARTMENT
STATE OF NEW JERSEY

ADULT PRESENTENCE REPORT

Superior Court of New Jersey

Docket #3678-85

Richard L. Albera
CHIEF PROBATION
OFFICER

NAME: WISNIEWSKI, John J.

D.O.B. 7-11-23 AGE 63 SEX M RACE W

SS# 154-16-9803 SBI# 305235 B

ADDRESS: 1112 Green Lea Drive
Holiday, Florida 33590

PHONE : (813) 784-8756

INC# S-123-86 PLEA AGREEMENT Yes

ORIGINAL CHARGES:
(1st Count) AGGRAVATED SEXUAL ASSAULT
2C:14-2(a)1
(2nd Count) SEXUAL ASAULT
2C:14-2B
(3rd Count) SEXUAL ASSAULT
2C:14-2b

FINAL CHARGES:
(3rd Count) SEXUAL ASSAULT
2C:14-2b
2nd Degree: 5 to 10 years
and/or $100,000.00 fine.

PRESENTOR'S RECOMMENDATION

Please see Prosecutor's Disposition Form

PENDING CHARGES:	None
DETAINERS:	None
PENALTY PURSUANT TO NJSA 2C43-3.1	Yes
DATE OF ARREST:	11- 9-85
DATE OF OFFENSE	9- 1-85 to 9-30-85
DATE OF CONVICTION:	9-22-86
PLEA	X
DATE OF SENTENCE	
JUDGE	Alfred D. Schiaffo
CUSTODIAL STATUS	
BAIL $5,000.00	ON: 11-9-85
JAIL TIME CREDIT	0 DAYS
ATTORNEY:	Michael J. Mella
PRIVATE	X
ADDRESS:	12-45 River Road Fair Lawn, NJ
PHONE :	(201)794-0022
OFFICER:	William Biondi(BP)
SUPERVISOR:	John Riegler

9-29-86

2C:44-1. Criteria for withholding or imposing sentence of imprisonment

a. In determining the appropriate sentence to be imposed on a person who has been convicted of an offense, the court may properly consider the following aggravating circumstances:

(1) The nature and circumstances of the offense, and the role of the actor therin, including whether or not it was committed in an especially heinous, cruel, or depraved manner;

(2) The gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill-health, or extreme youth, or was for

any other reason substantially incapable of exercising normal physical or mental power of resistance;

(3) The risk that the defendant will commit another offense;

(4) A lesser sentence will depreciate the seriousness of the defendant's offense because it involved a breach of the public trust under chapters 27 and 30, or the defendant took advantage of a position of trust or confidence to commit the offense;

(5) There is a substantial likelihood that the defendant is involved in organized criminal activity.

(6) The extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted;

(7) The defendant committed the

offense pursuant to an agreement that he either pay or be paid for the commission of the offense and the pecuniary incentive was beyond that inherent in the offense itself;

(8) The defendant committed the offense against a police or other law enforcement officer, correctional employee or fireman, acting in the performance of his duties while in uniform or exhibiting evidence of his authority, or the defendant committed the offense because of the status of the victim as a public servant;

(9) The need for deterring the defendant and others from violating the law.

b. In determining the appropriate sentence to be imposed on a person who has been convicted of an offense, the

court may properly consider the following mitigating circumstances:

(1) The defendant's conduct neither caused nor threatened serious harm;

(2) The defendant did not contemplate that his conduct would cause or threaten serious harm;

(3) The defendant acted under a strong provocation;

(4) There were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense;

(5) The victim of the defendant's conduct induced or facilitated its commission;

(6) The defendant has compensated or will compensate the victim of his conduct for the damage or injury that he sustained, or will participate in a

program of community service;

(7) The defendant has no history of prior delinquency or ciminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense;

(8) The defendant's conduct was the result of circumstances unlikely to reoccur;

(9) The character and attitudes of the defendant indicate that he is unlikely to commit another offense;

(10) The defendant is particularly likely to respond affirmatively to probationary treatment;

(11) The imprisonment of the defendant would entail excessive hardship to himself or his dependents;

(12) The willingness of the defendant to cooperate with law enforcement authorities;

(13) The conduct of a youthful defendant was substantially influenced by another person more mature than the defendant.

c. (1) A plea of guilty by a defendant or failure to so plead shall not be considered in withholding or imposing a sentence of imprisonment.

(2) When imposing a sentence of imprisonment the court shall consider the defendant's eligibility for release under the law governing parole, including time credits awarded pursuant to Title 30 of the Revised Statutes, in determining the appropriate term of imprisonment.

d. Presumption of imprisonment. The court shall deal with a person who has been convicted of a crime of the first or second degree by imposing a

sentence of imprisonment unless, having regard to the character and condition of the defendant, it is of the opinion that his imprisonment would be a serious injustice which overrides the need to deter such conduct by others.

e. The court shall deal with a person convicted of an offense other than a crime of the first or second degree, who has not previously been convicted of an offense, without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the offense and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for the protection of the public under the criteria set forth in subsection a.

f. Presumptive Sentences. (1)

When a court determines that a sentence be imposed, it shall, except for murder or kidnapping, sentence the defendant to a term of 15 years for a crime of the first degree, to a term of 7 years for a crime of the second degree, to a term of 4 years for a crime of the third degree and to a term of 9 months for a crime of the fourth degree unless the preponderance of aggravating factors or preponderance of mitigating factors, as set forth in subsections a. and b. weights in favor of higher or lower terms within the limits provided in 2C:43-6.

In imposing a minimum term pursuant to 2C:43-6b, the sentencing court shall specifically place on the record the aggravating factors set forth in this section which justify the imposition of a minimum term.

(2) In cases of convictions for crimes of the first or second degree where the court is clearly convinced that the mitigating factors substantially outweight the aggravating factors and where the interest of justice demands, the court may sentence the defendant to a term appropriate to a crime of one degree lower than that of the crime for which he was convicted. If the court does impose sentence pursuant to this paaragraph, or if the court imposes a non-custodial or probationary sentence upon conviction for a crime of the first or second degree, such sentence shall not become final for 10 days in order to permit the appeal of such sentence by the prosecution.

L.1978,c.95,§2C:44-1,eff.Sept. 1,1979.
Amended by L.1979,c.178,§93,eff.Sept.1, 1979; L.1981,c.290,§40,eff.Sept.24,1981.

2:9-3. Stay Pending Review in Criminal Actions

(a) Death Penalty. Unless the court otherwise orders, a sentence of death shall be stayed if an appeal is taken.

(b) Imprisonment. A sentence of imprisonment shall not be stayed by the taking of an appeal or by the filing of a notice of petition for certification, but the defendant may be admitted to bail as provided in R. 2:9-4.

(c) Fine; Probation. A sentence to pay a fine and an order placing the defendant on probation may be stayed by the trial judge on appropriate terms if an appeal is taken or a notice of petition for certification is filed. If he denies a stay, he shall state his reasons briefly, and the application may be renewed before the appellate court. Pending the appellate pro-

ceedings, the court may require the defendant to deposit, in whole or part, the fine and costs with the official authorized by law to receive the same in the county in which the conviction was had, or may require him to give bond for the payment thereof, or to submit to an examination of assets, and may make an appropriate order restraining him from dissipating his assets.

(d) Stay Follwing Appeal by the State. Notwithstanding paragraphs (b) and (c) of this rule, execution of sentence shall be stayed pending appeal by the State pursuant to N.J.S.A. 2C:44-1f(2). Whether the sentence is custodial or non-custodial, bail pursuant to Rule 2:9-4 shall be established as appropriate under the circumstances. A defendant may elect to execute a sen-

tence stayed by the State's appeal but such election shall constitute a waiver of his right to challenge any sentence increase on grounds that execution has commenced.

(e) Court to Which Motion is Made. Pending appeal or certification to the Supreme Court respecting a judgment of the Appellate Division, application for a stay pending review shall be first made to the Appellate Division.

Note: Source - R.R.1:2-8(a)(sixth sentence), 1:4-3(a)(first sentence)(b)(c)(d); paragraph (c) amended and paragraph (d) deleted July 29, 1977 to be effective September 6, 1977; paragraph (c) caption amended July 24, 1978 to be effective September 11, 1978; paragraph (d) adopted September 10, 1979 to be effective immediately; paragraph (d) amended July 16, 1981 to be effective September 14, 1981; paragraph (e) adopted November 1, 1985 to be effective January 2, 1986.

2:9-4 Bail After Conviction

Except as otherwise provided by R.

2:9-5(a), the defendant in criminal actions shall be admitted to bail on motion and notice to the county prosecutor pending the prosecution of an appeal or proceedings for certification only if it appears that the case involves a substantial question which should be determined by the appellate court and that the safety of any person or of the community will not be seriously threatened if the defendant remains at large. Pending appeal to the Appellate Division, bail may be allowed by the trial judge, or if denied by it, by the Supreme Court. A copy of an order entered by an appellate court granting bail shall be forwarded by the clerk of the appellate court to the sentencing court and clerk of the trial court. A trial judge denying

bail shall state briefly his reasons therefor. A judge or court allowing bail may at any time revoke the order admitting to bail. In no case shall a defendant who has received a sentence of death be admitted to bail.

Note. Source - R.R.1:4-3(c), 1:4-4. Amended June 29, 1973 effective September 10, 1973. Amended July 17, 1975 to be effective September 8, 1975.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
INDICTMENT NO. S-123-86
APP. DIV. DKT. A-2941-86-T5

STATE OF NEW JERSEY,
-vs-
JOHN S. WISNIEWSKI,
Defendant

STENOGRAPHIC TRANCRIPT
OF
PLEA PROCEEDINGS

B E F O R E :

THE HON. ALFRED D. SCHIAFFO, J.S.C
BERGEN COUNTY COURTHOUSE
HACKENSACK, NEW JERSEY 07601
SEPTEMBER 22, 1986

TRANSCRIPT ORDERED BY:
SUSAN W. SCIACCA, ESQ.
ASST. BERGEN COUNTY PROSECUTOR
BERGEN COUNTY PROSECUTOR'S OFFICE

A P P E A R A N C E S :
LARRY J. McCLURE, ESQ.
Prosecutor, Bergen County
BY: PATRICIA BAGLIVI, ESQ.
Asst. Prosecutor, Bergen County
For the State of New Jersey

MICHAEL J. MELLA, ESQ.
For the Defendant John Wisniewski.

Computer Aided Transcription
Reporter by:
Janice Marie Abbate, C.S.R.
Bergen County Courthouse
Hackensack, New Jersey 07601

(Whereupon, this matter was convened by the Court.)

THE COURT: All right.

MS. BAGLIVI: The State moves the plea of Joseph (sic) Wisniewski as Indictment --

MR. MELLA: It's John.

MS. BAGLIVI: I'm sorry. The State moves the plea of John Wisniewski on Indictment S-123-86.

Pursuant to plea negotiations between the defense attorney and Mr. Mueller whose case this is, it's my understanding that the Defendant wishes to retract his previously entered plea of not guilty and enter a plea of guilty to Count Three of this Indictment.

The State at time of sentencing would move to dismiss Counts One and Two.

Your Honor, it's a second degree offense and there's a ten year maximum cap on it.

That's the extent of the plea negotiations.

THE COURT: There's no negotiations except for the dismissal of the Counts?

MS. BAGLIVI: Right.

THE COURT: He's pleading directly to the charge, is that it?

MS. BAGLIVI: Yes, Sir.

MR. MELLA: That is correct, Judge.

THE COURT: I'll hear you.

MR. MELLA: Your Honor, I've discussed this matter fully with Mr. Wisniewski and have advised him of his right to a trial by jury at which time the State would be put through the burden of proving each and every element of the charge against Mr. Wisniewski beyond a reasonable doubt.

Also at the trial we would have a right to question the State's witnesses, produce our own witnesses and he would have a right to take the stand and testify in his own behalf or he would have a right to remain silent at which time the jury could not make any inference or use that silence against him.

I also went over the plea agreement as stated by the Prosecutor. I've gone over it with him, read the questions to him, I believe he understands them. I asked him if the answers he supplied were true to the questions on the plea agreement and he indicated to me that, in fact, they were true. He signed the agreement in my presence and all other answers as to the legal questions were written by myself.

He indicated he's not on parole or probation and I advised him in any event that if he was on parole or probation his plea would affect that and since he's not it won't affect it.

I further advised him that if a jail term or fine is imposed he would be required to pay a penalty of twenty-five dollars to the Violent Crimes Compensation Board. He said to me that he understood all the terms of the agreement and he understood the charge and still wishes to plead guilty and at this time I would present him to the Court for a factual basis on the charge itself.

THE COURT: All right. Is that right Mr. Wisniewski you wasn't (sic) to plead guilty to this act of sexual assault?

THE DEFENDANT: Yes.

THE COURT: Now, you heard the Prosecutor tell me that she was in conference, in negotiations with your lawyer and you were involved in an agreement therefrom and that agreement is that in consideration of your pleading guilty to this Third Count of sexual assault they're going to dismiss two other Counts against you. And, did they promise you anything else?

THE DEFENDANT: No, Sir.

THE COURT: Is anybody forcing you to plead guilty today?

THE DEFENDANT: No, Sir.

THE COURT: Now, you heard your lawyer tell me that he sat down in conference, talked about this case, and he told you, I'm sure, that you don't have to plead guilty, that you have a right

to have this case tried before a jury. Do you understand that?

THE DEFENDANT: Yes, Sir.

THE COURT: The right to put the State through the burden of proving all of the elements of the offenses beyond a reasonable doubt and the right to put the State through the burden of confronting you with witnesses in this case which witnesses you would have a right through your lawyer to cross-examine, you would have a right to produce your own witnesses, you would have a right to take the stand and tell your story or you would have a right to remain silent if you choose to do that. Did he explain all that to you?

THE DEFENDANT: Yes.

THE COURT: Did you understand him?

THE DEFENDANT: Yes.

THE COURT: Now, he handed me this form which I'm holding up for the Record which is called a Plea Agreement, you should have a copy there in front of you. Do you recognize the form?

THE DEFENDANT: Yes, sir.

THE COURT: Did you go over it with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: Are all the answers that you furnished on the form true and correct?

THE DEFENDANT: Yes, sir.

THE COURT: You understood the form, did you not?

THE DEFENDANT: Yes.

THE COURT: On page three you signed it?

THE DEFENDANT: Yes.

THE COURT: All right. Having read it, understood it and signed it you're aware, then, Mr. Wisniewski, that --

This is a five to ten year exposure?

MS. BAGLIVI: Yes, sir.

THE COURT: -- that the maximum jail term -- or a jail term can be imposed upon you of between five and ten years in this case. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: In addition to that a fine of one hundred thousand dollars could be imposed by me on you. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Furthermore, did your lawyer explain to you that if I choose to do so I can direct that you serve up to one-half or whatever jail term I impose before you would be eligible for parole? Did he explain that to you?

THE DEFENDANT: Yes.

THE COURT: And, regardless of the nature of the jail term, if any, regardless of the fine, if any, at the time of the sentencing you'll be required to pay the sum of not less than twenty-five dollars or up to ten thousand dollars depending on the injuries, what the Presentence Report shows me, as a penalty to the Violent Crimes Compensation Board. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Knowing all these things, Mr. Wisniewski, you still wish to plead guilty?

THE DEFENDANT: Yes.

THE COURT: What happened here? It says that you, on or about, during and between September 1st 1983 and September

30th 1985, in Garfield, that you committed sexual assault upon a girl -- Was it a girl?

MS. BAGLIVI: Yes, sir.

THE COURT: -- by committing sexual contact on someone who was obviously between -- less than thirteen years of age. You, of course, being four years older than that. Tell me about that.

THE DEFENDANT: I took her in the house and pulled down her pants and rubbed my hands on her vagina.

THE COURT: There's no question you're guilty of this, is there?

THE DEFENDANT: No, sir.

THE COURT: The Court is satisfied that there's a factual basis for the plea, it was made voluntarily, not as a result of any inducements or promises which are not disclosed of Record, nor

have there thereby (sic) any threats or coercive measures used.

This Defendant understands the nature of the charges against him and the consequences of his plea: he's been represented by counsel throughout the entire proceedings.

The Court acknowledges receipt of the Plea Agreement, asks that the Clerk file the same in the Docket and accepts a plea of guilty to the Third Count of Indictment S-123 of the '86 term, fixes November 7th 1986 as the date for sentencing.

MR. MELLA: Your Honor, is it possible to fix a sentencing date for December? The reason I ask that is because Mr. Wisniewski now resides in Florida and he's been going for private treatment.

THE COURT: This is only an administrative date. It's got to go to Avenel.

MS. BAGLIVI: It will never be ready by November anyway.

THE COURT: I'm only using that so we don't lose tract of the case. The sentencing date is subject to a receipt of a report from Avenel and, just as the Prosecutor correctly points out, we'll probably never get to it until much later than that.

MR. MELLA: All right. Thank you, your Honor.

THE COURT: So, you know, just keep in touch.

MR. MELLA: You have the new address on the form.

Thank you Judge.

THE COURT: We'll continue bail.

MR. MELLA: Thank you, Judge.

(Whereupon, this matter was concluded.)

C E R T I F I C A T E

* * * * * * * * * * * *

I, JANICE MARIE ABBATE, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify the foregoing to be a true and accurate transcript of my stenographic notes in the above-entitled matter.

/s/ Janice Marie Abbate

JANICE MARIE ABBATE
Certified Shorthand Reporter
Certificate No.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
INDICTMENT NO. S-123-86
APP. DIV. DKT. A-2941-86-T5

STATE OF NEW JERSEY,
-vs-
JOHN S. WISNIEWSKI,
Defendant

STENOGRAPHIC TRANCRIPT
OF
SENTENCE PROCEEDINGS

B E F O R E :

THE HON. ALFRED D. SCHIAFFO, J.S.C
BERGEN COUNTY COURTHOUSE
HACKENSACK, NEW JERSEY 07601
FEBRUARY 27, 1987

TRANSCRIPT ORDERED BY:
SUSAN W. SCIACCA, ESQ.
ASST. BERGEN COUNTY PROSECUTOR
BERGEN COUNTY PROSECUTOR'S OFFICE

A P P E A R A N C E S :
LARRY J. McCLURE, ESQ.
Prosecutor, Bergen County
BY: ROBERT BYRNE, ESQ.
Assistant Prosecutor
For the State of New Jersey

MICHAEL J. MELLA, ESQ.
For the Defendant John Wisniewski.

Computer Aided Transcription
Reporter by:
Janice Marie Abbate, C.S.R.
Bergen County Courthouse
Hackensack, New Jersey 07601

(Whereupon, this matter was convened by the Court.)

THE COURT: All right.

MR. BYRNE: Your Honor, at his time the State moves the sentence of John J. Wisniewski on Indictment S-123-86.

THE COURT: Did you get a copy of the Presentence Report?

MR. MELLA: Yes, your Honor. I've read the Presentence Report with my client, Mr. Wisniewski, and the report is accurate as it has been prepared.

THE COURT: How about the Avenel report?

MR. MELLA: I've also read the Avenel report and that's also accurate as prepared. No changes or corrections.

THE COURT: Is there anything you

want to tell me before I sentence you, Mr. Wisnewski?

THE DEFENDANT: I want to apologize, I'm sorry to the girl and her family. I pray to God, I'd even get on my hands and knees to beg for forgiveness. I want to say I'm sorry for the grief and hurt I gave my wife and the family and my friends. I pray to God that you'll forgive me, too.

THE COURT: Mr. Mella?

MR. MELLA: Yes, your Honor, thank you.

Your Honor, --

THE COURT: Now, I've received all these letters so I don't have to hear about this.

MR. MELLA: I know you received the letters and the reports, I wasn't even going to. It was just, obviously, just

to refer to the fact that you've received them.

I'd like to say to the Court that I've known Mr. Wisniewski personally for approximately fifteen years. Needless to say, when he called me about this incident I was as shocked and surprised as everyone else. I'd known him to be a stable individual and a man of integrity, a responsible person, and I just couldn't believe what had happened. I've known his wife Mildred, who is here this morning, sitting in the first row, and I've known the family. This is so surprising, it wasn't like what John Wisniewski was as a person.

The first thing he told me when he came to my office after he called me, he said, I did it, I don't want this

girl or her family hurt or involved any further. That's the first thing he said to me, Judge. Now, I'm a family person, I have a young daughter, these things affect me, I know yo have children, I know they affect you, I know they affect anyone who has children. It's hard to imagine how this could have happened.

Now, the medical reports you have, I'm sure you read them, submitted to you, have given some indication as to why it may have happened. I'm not going to go into that, your Honor, I know you've read that, but I'd like to express to you this morning why I think Mr. Wisniewski would be a candidate for probation rather than incarceration.

Mr. Wisniewski at this point has suffered tremendously. We know the

family of the victim has suffered as well. But one thing I think Mr. Wisniewski should be given mitigation credit for is that when he was confronted by the arresting officer he immediately admitted it. He didn't deny it at all because he knew from the moment after the offense happened, when he looked in the mirror, your Honor, he knew immediately that he had done something he should have been ashamed of, something that was wrong, and that's reflected in the medical reports.

So, when he was confronted by the authorities he didn't deny it, he immediately admitted it, admitted his shame, admitted his guilt. From that day forward what he attempted to do was get himself some help because what he

did was an act of a person who needed psychiatric help.

Now, I just want to call briefly to your attention the three medical reports. I'm not going to go into them but, just as an example, the Avenel report from Dr. Frank (phonetic) indicates that Mr. Wisniewski does show remorse, not that he's just expressed remorse by saying I'm sorry because that's not enough, but in the report it says that the test results, in however they do these tests, I'm not quite familiar with them but it says that the test results show Mr. Wisniewski has remorse for what he has done.

The report from Avenel also indicates that he is not a person that would be a continual sexual deviant, so that he's not a danger to further acts of

this kind to the community, and, therefore, he doesn't come under the Sexual Offenders Act.

The report of Doctor Samuels here in New Jersey recommended that he have continued outpatient psychotherapy and he did this while he was here in New Jersey. He also said in his report that he's not a danger to society.

Now, the latest doctor, Doctor Stefapopolis (phonetic) down in Florida who was given a couple reports, he's classified Mr. Wisniewski as chronically depressed, who needs further treatment. He recommends in-patient -- recommends outpatient tratment because he said in-patient treatment could be dangerous to his health but he did not believe that he would be dangerous to anyone on the outside, does not believe

this would ever happen again, and, as everyone else believes, that this was a single isolated event which I believe as well.

Mr. Wisniewski can never really be punished enough for what he's done, we all know that, but he has been punished, he was a respected person in the community, he seved his country in the Navy during World War II, came out, worked, raised a family, had his various traumatic incidents, with regard to the passing of his first wife, he served his community in various activities, he was a respected person in his community. All of that is lost.

As your Honor can tell from the letters that were submitted, and there were a number of them, Mr. Wisniewski

was, in fact, a respected person. Various letters indicate that they had respect and high regard for him.

All of that regard, all of that respect has been completely diminished and is gone. It is obvious the community is well aware of what is happening, it's been in the papers, everyone read it. His life has to be changed. So, when he came to me he asked me what should I do, I know I'm guilty. I said, John you've got to pay for it. The first thing you have to do is get out of the school system of Garfield, you can't be around children at this point, because I didn't know whether this was a continuous act, it wasn't one act at that point, the first thing you have to do is retire, you can't stay in that system, and he did,

he retired almost -- in fact, I think it was the day after he came to my office or the same day he wrote the letter of resignation.

Next thing I said to him, he told me, I can't face the people in my community, it's impossible, I'm ashamed, embarrassed, I've hurt my family, my friends, I hurt my little neighbor next door. I said, the only thing I can tell you is relocate, start a new life somewhere else. He told me he had a daughter in Florida. I said, well, that's probably the best place to go then. With that he sold his house, relocated, he and his wife are in Florida where he's been living for approximately a year.

In the eighteen months since the incident happened we've had him under

treatment here in New Jersey and continuing treatment in Florida.

This man has suffered. He has what I think is very important, your Honor and that is the remorse for this child and the child's family. He said to me, don't involve them, I don't want any kind of trial, don't try any kind of legal tricks, this is his words to me the first day he met with me, and I've known him for fifteen years, he came to me as an attorney, of course, but also as a friend because we have been friends over that period of time.

Your Honor, this is a man that had an isolated miscalculation of judgment for whatever reason. You and I probably couldn't understand this completely because you and I probably will would never do this, hopefully. The

reports indicate that there were certain factors that caused him to have this loss of judgment. It's hard for me to understand it. I'm not a trained psychologist, I have a difficult time understanding what makes people commit acts of this kind.

Your Honor, I do know one thing, I'm confident and I'm convinced, and I can say this without any hesitation to this Court, John Wisniewski has paid for this but he still needs help. He still needs help because the doctors tell me he needs help.

I would like your Honor to, in your wisdom, to allow Mr. Wisniewski to return home with his wife to Florida -- incidentally, your Honor, his wife will be seventy years old, Mr. Wisniewski will be sixty-four years old in July --

and give them an opportunity with the help of a psychotherapist in Florida to live out their remaining years of their lives. They'll never be able to put this out of their minds, they'll pay for this forever, but I think, your Honor, incarceration at this point for this one isolated incident, and only for this particular incident, he's never been involved in any other violation of the law of any kind, of any nature, I think your Honor will do more good in this situation by allowing an outpatient kind of psychotherapy in the State of Florida where he presently resides with his wife. I would request that your Honor consider that very deeply.

MR. BYRNE: Your Honor, the State certainly recognizes the mitigating

factors in this matter and we do not deny that treatment is certainly warranted in this case. But, your Honor, this is a matter which took place upon a seven year old child, a seven year old child, who has to live now her entire life with the psychological trauma that she's been abused by an adult. I think that the need for deterrance in this area is definitely necessary. I think that we have an interest, the State has an interest, in protecting young victims as well as old victims but certainly young victims who don't know what's happening to them and have no way of fighting back.

THE COURT: That's why there's a law, the State has an interest and has expressed it by virtue of a law. We're talking about sentencing now, not

whether or not it should be a crime, it is a crime.

MR. BYRNE: It is a crime, and I think we have to put meaning behind those laws.

This offense, Judge, carries a maximum ten year penalty and the State certainly feels that a period of incarceration is warranted here. However, if your Honor feels this Defendant is incapable of serving a period of incarceration or should not have a period of incarceration we would accept a suspended jail term with probation.

THE COURT: What's a suspended jail term?

MR. BYRNE: Suspended jail sentence.

THE COURT: Never heard of that.

MR. BYRNE: A jail sentence suspended and probation given.

THE COURT: Under the new Code they don't do that. You can suspend sentence but you don't say five years suspended. That used to be under the old way. Maybe they do it in juvenile court or somehing but they don't do it here.

MR. BYRNE: Okay, Judge. In which case we would ask for incarceration. If your Honor feels incarceration is not the suitable deterrent here we would ask for a long-term probation to include psychiatric counseling.

THE COURT: Well, the problem here with this being an offense is that it comes within the purview of State vs. Roth and State vs. Hodge, it's a second degree offense, wherein the presumption is incarceration, unless, for good cause shown, I do not impose a term of

incarceration. If I do not impose a term of incarceration your office, the Prosecutor's Office, has ten days in which to -- for me to stay sentence from which you may get an appeal from the Appellate Division.

Avenel is -- all these cases that come here are cases that involve young children. Whether I gave this fellow life in prison, the death penalty or a ten dollar fine, none of that is going to have any affect on the trauma that is going to be experienced by the young girl that was involved here. That is an unfortunate situation, that's the Humpty-Dumpty facet of this business. You can't put it together again once it's occurred.

The background of this man, a sixty-three year old man, indicates that this

was twenty minutes of abhorrent behavior in the lifetime of an otherwise individual of social service, civic service, service in the community. Somewhere along the line within those twenty minutes the mental processes, the impotency that he experiences as a result of his diabetes, the frustration, I suppose, sexually, it all came to the surface in that one horrendous nightmare.

Again, I can't help but feel, certainly, great sympathy for the child. Would it do anything for her by doing anything to him? I have to now consider him.

Avenel does not consider it compulsive behavior but Avenel gives a caveat there, if you read it properly, it says something that concerns me:

"Although it is possible that the present offense represents the start of what would prove to be a deviant sexual arousel pattern there is insufficient evidence at present to clearly establish a pattern of sexual compulsivity."

I think, given the age of the man, the mitigating circumstances, given the fact that he's never committed anything before, I'd like to feel that, and I express the opinion, it was under circumstances unlikely to recur, he's unlikely to commit another offense unless there's something that we cannot predict from a mental viewpoint, that no one can predict on this earth. The injury -- the hardship to his dependents, his age, his health, are all sufficient factors I think for this

Court to conclude that there's been good cause shown here to give a probationary term without incarceration which I plan to do.

That probationary term shall be transferred to Florida where he now resides. He's in a different milieu now, a different environment.

This sentence shall be conditioned upon the provision that he seek psychiatric counseling from a professional of his own choosing.

So, the sentence of this Court, based on those mitigating circumstances present as this Court sees it, is you shall be placed on probation for five years, pay the sum of thirty dollars -- twenty five dollars as a penalty to the Violent Crimes Compensation Board. A condition of probation is that he seek

therapy as I have just heretofore pointed out.

This sentence shall not become final for ten days in order to permit the appeal of such sentence by the Prosecutor in accordance with 2C:44-1f(2).

Your have a right to appeal from this sentence, Mr. Wisniewski. If you decide to appeal and can't afford a lawyer one will be provided for you. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Something snapped, I don't know what it is. A former mayor of the community, a high civic person, I got letters galore from the entire community as to how he's held in their repute, the president of this company, president of that company, President of Spencer Savings and Loan, Principal of

School 6, School 5, Washington Irving School, Director of Physical Education, Editor of the local paper, members of the Board of Education, pastors, of course, Suprintendent of Schools and another principal, all individuals who had to deal with him within the area of school, all indicated that his conduct has never been suspected, questionable, in the area of school and children, which are factors I would think I've had to consider in the face of his age, in the face of the other circumstances that I've discussed.

All right. That's it.

MR. BYRNE: Thank you, Judge.

MR. MELLA: I think there are Counts to dismiss.

THE COURT: Yes, the Second and Third Count.

MR. BYRNE: No, the First and Second Counts, your Honor.

We would like a Motion to have those dismissed at this time.

THE COURT: Granted.

MR. MELLA: Judge, thank you very much.

(Whereupon, this matter was concluded.)

C E R T I F I C A T I O N
* * * * * * * * * * * * * *

I JANICE MARIE ABBATE, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify the foregoing to be a true and accurate transcript of my stenographic notes in the above-entitled matter.

/s/ Janice Marie Abbate
JANICE MARIE ABBATE
Certified Shorthand Reporter
Certificate No.

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Attorney for Petitioner

Plaintiff STATE OF NEW JERSEY -vs- Defendant JOHN S. WISNIEWSKI	SUPREME COURT OF NEW JERSEY DOCKET NO.28,167 (A-2941-86T5) PETITION FOR CERTIFICATION Criminal Action SAT BELOW: HON. THOMAS F. SHEBELL, JR. HON. A.M. STEIN

PETITION FOR CERTIFICATION
FOR
PETITIONER, JOHN S. WISNIEWSKi

MICHAEL J. MELLA, ESQ.
On the Petition

TABLE OF CONTENTS

QUESTIONS PRESENTED

1. Whether the presumption of incarceration was overcome, allowing the sentencing court to impose a sentence of probation?

2. Did the Appellate Division err in interpreting the presumption of imprisonment as set forth in State v. Roth, 95 N.J. 334 (1984)?

3. Did the Appellate Division err in deciding that the State of New Jersey did not waive its right to seek incarceration at the time of sentencing?

4. Does Wisniewski's Petition for Certiorari present a question of general public importance which has not been settled by the Supreme Court?

5. Does Wisniewski's Petition present the question which calls for the exercise of Supreme Court supervision?

STATEMENT OF PROCEDURAL HISTORY

Bergen County Indictment No. S-123-86 charged defendant-respondent JOHN S. WISNIEWSKI in Count I with aggravated sexual assault (a first degree crime) in that he performed cunnilingus upon R.B., a seven year old girl, in violation of N.J.S.A. 2C:14-2(a)(1), in Count II with sexual assault (a second degree crime) by forcing the victim to touch the defendant's penis, in violation of N.J.S.A. 2C:14-2b; and in Count III with a second charge of sexual assault by touching the victim's genitals, contrary to N.J.S.A. 2C:14-2(b).

On September 22, 1986, in the Superior Court of New Jersey, Law Division, Bergen County, before the Honorable Alfred D. Schiaffo, J.S.C.,

defendant entered a plea of guilty to Count III, sexual assault. Pursuant to plea negotiations, the State agreed to move to dismiss the remaining counts at the time of sentencing. No agreement was made with regard to the sentence, but defendant acknowledged on the record that he knew his prison exposure would be five to ten years and that a parole ineligibility period of up to one-half that term could be imposed.

On February 27, 1987, Judge Schiaffo sentenced defendant to five years of probation, with permission to transfer the probation to Florida, and a $25.00 penalty payable to the Violent Crimes Compensation Board. The probation was conditioned on his seeking psychiatric counselling of defendant's choice. The court stayed the sentence

for ten days to permit the State time to file an appeal.

On March 4, 1987, within the ten day period, the State filed a Notice of Appeal with the Appellate Division. Thereafter, Judge Schiaffo extended the stay pending the resolution of the appeal.

On December 2, 1987, the Appellate Division of the Superior Court of New Jersey, in a Per Curiam decision reversed the sentence of probation and remanded the matter to the Law Division for further proceedings in accordance with the Appellate Division decision. The Appellate Division did not retain jurisdiction.

On December 21, 1987, a Notice of Petition for Certification was filed with the Clerk of the Supreme Court.

STATEMENT OF FACTS

One afternoon during the month of September 1985, a seven-year old second grade girl named R.B., was playing outside her home when she saw John Wisniewski (age 62) and walked over to him. The little girl knew Mr. Wisniewski because he was her next door neighbor and because he worked at her school. When R.B. approached, Wisniewski greeted her and then told her he was going to eat her up, a comment that the child did not understand. The defendant directed her inside his home and told her to lie down on his couch. R.B. compled. Wisniewski then removed her pants and panties and performed cunnilingus on her by licking -- and slightly penetrating--her vagina. He then rubbed her vagina with his fingers.

When defendant finished these acts he told the little girl it was her turn and then he pulled down his zipper, displayed his penis, and masturbated in front of her. He proceeded to go into the bathroom where he ejaculated into the toilet in view of the child. He then told R.B. not to tell anyone what had occurred.

The little girl's mother did not learn of these events until two months later, after R.B. told several of her classmates, one of whom told her own mother, who in turn hold R.B.'s mother. The victim's mother called the Garfield Police, who contacted the Bergen County Prosecutor's Office. After Senior Investigator Nass of the Prosecutor's Office took a statement from the little girl, the Garfield Police arrested

Wisniewski. Wisniewski subsequently gave a statement to Senior Investigator Nass in which he confessed performing the sexual acts upon the child. He told the investigator, however, that after he made his comment to R.B. about eating her up she had said, "Go ahead. Not out here. Let's go in the house." He also stated that she had been the one "on her own accord" to lie down on the couch.

LEGAL ARGUMENT

POINT I

The Appellate Division incorrectly determined that the presumption of incarceration was not overcome in this case. The Appellate Division stated on page 3 of its decision, "Considering the gravity of this crime, neither this defendant's health nor the interference with his retirement to Florida constitute sufficient cause to conclude that imposition of a prison term constitutes a serious injustice." This is not a fair interpretation of what the sentencing Judge determined. The sentencing Judge reviewed in depth the Avenel report as well as the reports of Dr. Athanasios Stefopoulos and Dr. Richard Samuels. The sentencing Judge also reviewed the pre-sentence report

as well as letters forwarded on behalf of the petitioner. The trial court found that the presumption for incarceration was in fact overcome when the court stated on page 15 of the transcript, beginning at line 4, the following:

> "I think, given the age of the man, the mitigating circumstances, given the fact that he has never committed anything before, I would like to feel that, and I express the opinion, it was under circumstances unlikely to recur, he is unlikely to commit another offense unless there is something that we cannot predict from a mental viewpoint, that no one can predict on this earth. The injury - the hardship to his dependants, his age, his health, are all sufficient factors I think for this court to conclude that there has been good cause shown here to give a probationery term without incarceration which I plan to do." TR, page 15, lines 4 through 18.

Contrary to the Appellate Division decision, the trial court had determined that the presumption of incarceration was overcome and appropriately sentenced the petitioner to probation with condition that he seek psychiatric counselling.

POINT II

The Appellate Division did not properly interpret the decision of State v. Roth, 95 N.J.334 (1984). In the Roth case, at page 358, the court states:

> "The residuum of power is to be exercised only under the narrow exception of the Statute, that is, when having regard to the character and condition of the defendant the court is of the opinion that his imprisonment would be a serious injustice which overrides the need to deter such conduct by others." N.J.S.A. 2C:44-1(d).

The trial court obviously found that a serious injustice would occur in the event the petitioner was incarcerated. It would appear that the Appellate Division misinterpreted the Roth case in this matter due to the fact that the trial court did not use the words "serious injustice."

Instead, it used the words, "for good cause shown." TR 13, line 10. This would appear to be a semantic situation since the trial court was well aware of the cases State v. Roth, Supra. and State v. Hodge, 95 N.J. 369 (1984). This point is well established on page 13 of the Transcript when the trial court stated, beginning at line 5 as follows:

> "Well, the problem here with this being an offense is that it comes within the purview of State v. Roth and State v. Hodge; it's a second degree offense, wherein the presumption is incarceration, unless, for good cause shown, I do not impose a term of incarceration."
> TR page 13, lines 5 through 11.

It is petitioner's contention that the trial court was correct in its determination that the presumption of incarceration was overcome

and that N.J.S.A. 2C:44-1(d) was also overcome in that a serious injustice would have occurred in the event of incarceration of the petitioner.

POINT III

Petitioner contends that the state waived its right for incarceration and, in effect, also waived its right to appeal the sentence of the trial court. On Page 12 of the Transcript the Prosecutor at line 3 stated: "This offense, Judge, carries a maximum ten year penalty and the State certainly feels that a period of incarceration is warranted here. However, if Your Honor feels this defendant is incapable of serving a period of incarceration or should not have a period of incarceration, we would accept a suspended jail term with probation." TR 12, lines 3 through 10.

Further, the Prosecutor stated, also on page 12, beginning at line

24: "O.K., Judge. In which case we would ask for incarceration. If Your Honor feels incarceration is not the suitable deterrent here, we would ask for a long term probation to include psychiatric counselling." TR page 12, lines 24 and 25, page 13, lines 1 through 4.

It is clear from the above quotes that the State of New Jersey, through the Prosecutor, was willing to accept a period of probation as opposed to incarceration for this petitioner. On page 12 of the Transcript, line 9, the Prosecutor specifically states as follow: "... We would accept a suspended jail term with probation." TR page 12, lines 9 and 10. It is clear that the State of New Jersey would have

been satisfied, based on the statement of the Prosecutor, with a probationery sentence with psychiatric counselling as a condition. This is exactly what the trial Judge did. So that, in effect, he gave an alternate sentence which was suggested by the Prosecutor himself. At this point it should be clear that the State did, in fact, waive its right to incarceration and, in effect, waived its right to appeal this sentence, and since the waiver was effective it would appear that the petitioner is being placed in double jeopardy by allowing the State to continue to prosecute and appeal of the sentence in this matter. If in fact this is a double jeopardy situation, to allow the

continuing appeal of the sentence will be a violation of New Jersey Constitution, Article 1, paragraph 11, and the Federal Constitution, Amendment V.

POINT IV

Petitioner contends that the questions set forth in this appeal are questions of general public importance which affect not only the petitioner but which could have effect on many other persons similarly sentenced by trial courts. The question now comes before the court as to whether or not the trial court has any discretion whatsoever in sentencing defendant when the defendant is charged with a crime which has a presumption of incarceration. Has the trial court lost

its discretion with regards to incarceration? The Appellate Division in its decision in this matter would appear to state that the trial court has no longer a discretion when it comes to incarceration but can merely sentence to one degree less. The petitioner does not believe this to be the case. Petitioner believes that the trial court still has a discretion when the interest of justice or as Judge Schiaffo in this case stated when good cause is shown. It is petitioner's contention that this is a question which needs Supreme Court review.

POINT V

Petitioner contends that the Supreme Court must exercise its supervisory powers under the facts of this case. The Supreme Court should set forth specifically whether or not the trial court does, in fact, have discretion, or has that discretion been removed completely. The Supreme Court should exercise its supervision in this area to prevent needless appeals by either the State or by the sentencing defendant. In this case, the petitioner contends that the discretion of the court was properly applied.

CONCLUSION

It is respectfully requested that this Petition for Certification be granted and the Supreme Court allow the appeal in this matter to be considered by the entire court for the reasons set forth above.

Respectfully submitted,

MICHAEL J. MELLA, ESQ.
Attorney for
Petitioner-Appellant

Dated: January 4, 1988

I certify that this Petition for Certification presents a substantial question and is filed in good faith and not for purposes of delay.

MICHAEL J. MELLA

Dated: January 4, 1988

CERTIFICATION AS TO SERVICE

I certify that the original and eight copies of the Petition for Certification on behalf of petitioner, John S. Wisniewski, along with nine copies of the Appellate Division brief and nine copies of the Appellate Division decision of December 2, 1987, as well as nine copies of the Petition for Certification was filed with the Clerk of the Supreme Court of New Jersey, Richard J. Hughes Justice Complex, CN-970, Trenton, New Jersey, by Express Mail on this date, along with a check for $20.00 representing filing fee.

I further certify that two copies of the Petition for Certification was forwarded to the

Bergen County Prosecutor's Office, attention Susan W. Scianna, Esq., and two copies of said document to the Clerk, Appellate Division, Trenton, New Jersey, by Lawyers Service, also on this date.

MICHAEL J. MELLA, ESQ.

Dated: January 4, 1988

No. 87-1858

In The

Supreme Court of the United States

October Term, 1987

JOHN S. WISNIEWSKI,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Writ of Certiorari to the Appellate Division of the Superior Court, State of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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9 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on March 10, 1988 and the petition for writ of certiorari was thereafter filed within time. Jurisdiction of this Court is sought to be invoked under 28 *U.S.C.* §1257 (3), but Respondent maintains that the present petition is from an interlocutory order rather than a final order.

SUMMARY OF ARGUMENT

Petitioner raises numerous challenges to the New Jersey statute which permits the State to appeal from certain lenient sentences, alleging that the resentencing constitutes a violation of the double jeopardy clause. A grant of certiorari to consider these challenges would be inappropriate because no final order has been entered in New Jersey. Moreover, the issues presented have never been raised by petitioner in the state courts. Finally, the bulk of petitioner's arguments have been recently addressed by the United States Supreme Court and there is no substantial reason for further consideration.

ARGUMENT

POINT I

THE FINALITY DOCTRINE PRECLUDES REVIEW.

Respondent contends that this Court has no jurisdiction to grant review of the present matter because no final order has been entered in the courts of New Jersey.

An examination of the opinion of the Appellate Division reveals that the case was remanded back to the sentencing court "for further proceedings in accordance with this opinion," *i.e.*, for re-sentencing pursuant to the statutes and caselaw discussed therein. (A-9). Although the New Jersey Supreme Court subsequently denied review, this case is far from concluded. Petitioner must be re-sentenced, following which, depending on the outcome, either he or the State or both parties will be able to pursue a further appeal. At such time, petitioner may raise the federal claims he now pursues.

The State fully realizes that the finality doctrine has not been construed rigidly but admits of various exceptions even when there are further proceedings available in State court. *Pennsylvania v. Ritchie*, ___ *U.S.* ___, 107 *S.Ct.* 989, 996, 94 *L.Ed.*2d 40 (1987). Uniformly, however, the exceptions demand that the federal issue be finally decided in the highest court of the State. *Cox Broadcasting Corp. v. Cohn*, 420 *U.S.* 469, 95 *S.Ct.* 1029, 1037-1041, 43 *L.Ed.*2d 328 (1975). The finality doctrine is not a "technicalit[y] to be easily scorned," particularly "when the jurisdiction of this Court is invoked to upset the decision of a State court." *Radio Station WOW, Inc. v. Johnson*, 326 *U.S.* 120, 124, 65 *S.Ct.* 1475, 1478, 89 *L.Ed.* 2092 (1945). Finality is essential to good judicial administration and "avoids the mischief of economic waste and of delayed justice." *Id.*

Although petitioner's federal issues have never been raised by him in the courts of New Jersey, a channel is clearly available. Respondent maintains that the finality doctrine precludes review in these circumstances.

POINT II

PETITIONER'S FAILURE TO RAISE HIS ISSUES IN STATE COURT PRECLUDES REVIEW.

The State contends that petitioner failed to preserve his constitutional contentions in the state courts of New Jersey. Although he now invokes the doctrine of double jeopardy to challenge the New Jersey statute which permits the State to appeal from certain lenient sentences, this issue was raised neither at the trial level nor in his brief in the Appellate Division of Superior Court. In his petition for certification to the New Jersey Supreme Court, petitioner alluded to double jeopardy, but only in the context of arguing that the State had waived its right to seek incarceration. (A-82 to A-83). Similarly, nowhere below did petitioner articulate his present objections that New Jersey's sentencing appeal statute is unconstitutionally vague and that his bail status constitutes commencement of his sentence.

New Jersey has a clear rule that issues "in no wise alluded to, much less squarely presented, in the courts below. . .need be given no consideration" in our higher appellate tribunals. *State v. Souss*, 65 *N.J.* 453, 460, 323 *A.*2d 484, 488 (1974). In light of the failure of petitioner to fully and fairly raise his claims in state court, the State submits that there is an adequate state law procedural ground barring present review of petitioner's federal contentions. *Michigan v. Tyler*, 436 *U.S.* 499, 512 n. 7, 98 *S.Ct.* 1942, 1951, 56 *L.Ed.*2d 486 (1978).

When a contention has not been raised in state court, "the issue is not one properly presented for review" before the United States Supreme Court. *Moore v. Illinois*,

408 *U.S.*786, 799, 92 *S.Ct.*2562, 2570, 33 *L.Ed.*2d 706 (1972). For this Court to grant review of a state court judgment, the record as a whole must show "either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb,* 451 *U.S.* 493, 496-497, 101 *S.Ct.* 1889, 68 *L.Ed.*2d 392 (1981). A casual reference to a federal doctrine "in the midst of an unrelated argument is insufficient to inform a state court that it has been presented with a claim subject to [the] appellate jurisdiction" of the United States Supreme Court. *Board of Directors of Rotary International v. Rotary Club of Duarte,* 481 *U.S.* ___, 107 *S.Ct.* 1940, 95 *L.Ed.*2d 474, 487 n. 9 (1987).

Accordingly, the State submits that the writ of certiorari should be denied for want of presentation of the issues to the courts of New Jersey.

POINT III

CASELAW CONCERNING THE DOUBLE JEOPARDY ASPECTS OF RESENTENCING IS TOO RECENT AND WELL-SETTLED TO WARRANT FURTHER EXAMINATION.

In *United States v. Di Francesco,* 449 *U.S.* 117, 101 *S.Ct.* 426, 66 *L.Ed.*2d 328 (1980), the United States Supreme Court ruled that resentencing under the auspices of a statute which permitted the prosecution to appeal a lenient sentence did not violate the Double Jeopardy Clause. Petitioner's arguments are premised on the notion that *Di Francesco* was wrongly decided and should be overruled. Respondent perceives no "special and important reasons" to grant certiorari to reconsider this opinion. *S.Ct. Rule* 17. Our position is bolstered by the fact that only two and a half years ago, this Court chose

to follow *Di Francesco* in *Pennsylvania v. Goldhammer*, 474 *U.S.* 28, 106 *S.Ct.* 353, 88 *L.Ed.*2d 183 (1985).

The present case is the product of a statute permitting the State of New Jersey to appeal certain categories of lenient sentences. *N.J.S.A.* 2C:44-1f(2). (A-20). As such, it arises from the same type of enabling statute which yielded the *Di Francesco* holding. Indeed, the Supreme Court of New Jersey placed explicit reliance on *Di Francesco* in upholding the constitutionality of our statute in the face of a challenge on double jeopardy grounds. *State v. Sanders*, 107 *N.J.* 609, 527 *A.*2d 442 (1987).

Applying the *Di Francesco* analysis to the present case, petitioner Wisniewski could not have expected that his sentence was final, for it fit one of the categories permitting the State to appeal. Moreover, the trial court explicitly informed defendant that his sentence would not become final for ten days in order to permit the prosecution to appeal. (A-61). Accordingly, if the touchstone of the *Di Francesco* double jeopardy analysis lies in the defendant's expectation of finality, a remand for resentencing in the present matter would not violate constitutional principles.

CONCLUSION

For the reasons stated herein the petition for a writ of certiorari should be denied.

Respectfully submitted,

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